

No. 14,725

United States Court of Appeals
For the Ninth Circuit

FRANKLIN SANTOS BOHOL and

HENRY TORRES DIAS,

vs.

Appellants,

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Territory of Hawaii.

BRIEF FOR APPELLANTS.

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I.

STATEMENT OF JURISDICTION.

By indictment returned by a grand jury in the United States District Court for the District of Hawaii it is charged that Appellants "wilfully, unlawfully and feloniously, fraudulently and knowingly sell to Clifford Kim Hee Kam a narcotic drug, to-wit, nine (9) capsules containing heroin hydrochloride, after importation, knowing the said narcotic drug to have been imported into the United States contrary to law, and knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute to Clifford Kim

Hee Kam a narcotic drug, to-wit, nine (9) capsules containing heroin hydrochloride, which narcotic drug was not then and there in the original stamped package and was not from the original stamped package." Upon conviction they were sentenced on the 19th day of January, 1955, on count I to the maximum term of five years imprisonment and to pay a fine of one dollar (\$1.00). Appellants were then sentenced on February 9, 1955 on counts II, III and IV to the maximum terms of five years imprisonment and to pay the fines of one dollar (\$1.00) on each of said counts II, III and IV. Sentence of imprisonment under count II is to run concurrently with the sentence imposed on count I and to begin as of January 19, 1955; and sentences of imprisonment under counts III and IV are to run concurrently with each other, but consecutively to counts I and II.

The jurisdiction of this Court to review the judgment of the District Court derives from Title 28 of the United States Code, "Judiciary and Judicial Procedure," Sections 1291 and 1294.

II

STATEMENT OF THE CASE.

An indictment purporting to charge Appellants with violations of Section 174, of Title 21 of the United States Code and Section 2553(a) of Title 26 of the United States Code was found by a United States grand jury in the District of Hawaii on December 13, 1954.

The Appellants were tried jointly and upon cross-examination of one of the Appellants, Franklin Santos Bohol, the United States Attorney questioned him on a conviction in 1953 in the District Court of Honolulu, which upon appeal to the Circuit Court of Honolulu was nolle prosequied. The question by the United States Attorney was objected to in as much as the Appellant, Franklin Santos Bohol, was not convicted in 1953.

III

SPECIFICATION OF ERROR RELIED UPON.

That the Court erred in allowing the United States Attorney to question one of the Appellants, Franklin Santos Bohol, about his conviction of possession of marijuana seeds of which he was convicted in the District Court of Honolulu, Territory of Hawaii, but which on appeal, was nolle prosequied in the Circuit Court of the First Judicial Circuit, Territory of Hawaii. (R. pp. 23 and 24.)

IV

ARGUMENT.

The Appellants in this case were tried jointly, and one of the Appellants, Franklin Santos Bohol, was questioned about a case which was dismissed in the Circuit Court of the Territory of Hawaii. Although Franklin Santos Bohol was convicted in the Terri-

torial District Court, his case on appeal to the Circuit Court of the Territory of Hawaii was nolle prosequi. (R. pp. 23 and 24.)

It has been definitely held in Hawaii that upon appeal from the Territorial District Courts to the Territorial Circuit Courts, a trial de novo is required. (30 H 468 at 470.) In view of this, Appellant, Franklin Santos Bohol was never convicted of the crime in 1953 for which he was questioned. The effect of the questioning by the United States Attorney of a crime for which Appellant, Franklin Santos Bohol, was not convicted was improper and prejudiced.

Justice Hughes in *Bates v. State*, 60 Ark. 450, 30 S. W. 890, very aptly stated that:

“A person charged with a crime, testifying in his own behalf, goes upon the stand under a cloud; he stands charged with a criminal offense, not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust, and if, in addition to this, he may be subjected to a cross-examination upon every incident of his life, and every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict, upon evidence which otherwise would be deemed insufficient.”

In the case of *Mitrovich v. United States*, 15 F. (2d) 163, Defendant, on cross-examination, was asked whether he had not been arrested on one or more

previous occasions. The witness answered "Twice". The Court held that the ruling admitting the testimony was both erroneous and prejudicial. The Court, quoting from *Glover v. United States*, 147 F. 426, 429, 77 C.C.A. 450, 453, said:

"It is competent for the purpose of discrediting a witness to show that he has been convicted of a crime. The general rule is that the crime must rise to the dignity of a felony or petit larceny. * * * Whatever may be the limit in this respect, nothing short of a conviction of a crime is admissible for the purpose of impeachment. A mere accusation or indictment will not be admitted, for the reason that innocent men are often arrested charged with criminal offense."

V

CONCLUSION.

It is respectfully submitted that Appellants were wrongfully convicted.

Dated, Honolulu, Hawaii,

July 14, 1955.

Respectfully submitted,

GEORGE Y. KOBAYASHI,

Attorney for Appellants.

